

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-3381-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KURT L. STOECKEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County:
EDWARD R. BRUNNER, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Kurt Stoeckel appeals a judgment convicting him of sexually assaulting his girlfriend's ten-year-old daughter and three counts of exposing her to harmful materials. He argues that the trial court improperly exercised its discretion when it allowed the State to present evidence of seventy-one other crimes Stoeckel committed between 1970 and 1984. Because

we conclude that the evidence of other crimes was not admissible under the test set out in *State v. Sullivan*, 216 Wis.2d 768, 772-73, 576 N.W.2d 30, 32-33 (1998), we reverse the judgment and remand the cause for a new trial.

Evidence of other crimes is admissible only if it meets a three-step test: (1) it must be offered for an acceptable purpose under § 904.04(2), STATS.,¹ rather than merely to show propensity; (2) it must be relevant, that is, it must relate to a fact or proposition that is of consequence to determination of the action and it must have a tendency to make the consequential fact or proposition more or less probable than it would be without the evidence; and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice. *Id.* The other crimes evidence arguably meets the first two tests. It is not admissible, however, because its minimal probative value is substantially outweighed by the danger of unfair prejudice.

The State argues that the other crimes evidence was admissible to show Stoeckel's motive, sexual gratification.² The victim testified that Stoeckel had her touch his penis until he ejaculated. While the State is required to establish

¹ Section 904.04(2), STATS., provides:

OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

² The prosecutor offered the evidence of Stoeckel's other crimes to show his preparation or plan. The State concedes on appeal that the evidence does not establish a plan because it does not show a definite prior design or scheme which includes assaulting the victim here. *See State v. Spraggin*, 77 Wis.2d 89, 99, 252 N.W.2d 94, 98 (1977). The other crimes committed by Stoeckel more than 10 years before the victim was born cannot reasonably be described as part of a prior design or scheme to have sexual contact with this child or expose her to harmful materials.

that the touching was for the purpose of sexual gratification, it is difficult to imagine any other possible motive on the facts presented here. While motive is an acceptable purpose for introducing other crimes evidence under § 904.04(2), STATS., and motive is a matter of consequence that is made somewhat more probable by introduction of the other crimes evidence, this evidence had very little probative value because it was introduced to prove an element that was practically self-evident.³

The evidence of seventy-one prior crimes was highly prejudicial. It poses a danger that the jury will believe Stoeckel was guilty of the crimes charged merely because he is a person likely to do such acts or they will condemn him, not because he is believed guilty of the present charge, but because he has escaped punishment from the other offenses. *See Whitty v. State*, 34 Wis.2d 278, 292, 149 N.W.2d 557, 563 (1967). Because the prejudicial effect of hearing the other crimes evidence substantially outweighed its probative value, we conclude that the trial court improperly exercised its discretion when it allowed the jury to hear of Stoeckel's numerous, dissimilar crimes committed long ago, merely to bolster the self-evident proposition that his motive for being masturbated by a child was

³ Probative value is measured by nearness in time, place and circumstance to the alleged crime. *See State v. Fishnick*, 127 Wis.2d 247, 261, 387 N.W.2d 272, 280 (1985). Here, one witness testified to "an affair" with Stoeckel that began 28 years ago when she was 14 years old. Another witness testified that 25 to 28 years ago, when she was 9, she awoke to find Stoeckel masturbating at the end of her bed and that on other occasions he french-kissed her and would peek at her when she was changing. Although she testified that he grabbed her vaginal area, he never requested that she touch him. Another witness testified that he observed Stoeckel masturbating 25 years ago and, although he was not sure, believes his sister was watching as well. A fourth witness testified that 22 years earlier, when she was 5 years old, she awoke to find Stoeckel kneeling between her legs touching himself and her vagina. She testified that he exposed himself approximately 30 times and on one occasion touched her. Although the crimes involved inappropriate sexual contact with children in a family-like setting, none of the other crimes was recent, or involved a child touching Stoeckel.

sexual gratification. Therefore, the matter must be retried before a jury that is not informed of Stoeckel's prior crimes.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

